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In the Supreme Court of the United States

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,
Petitioner.

vs.

BUD R. LATTA,
Respondent.

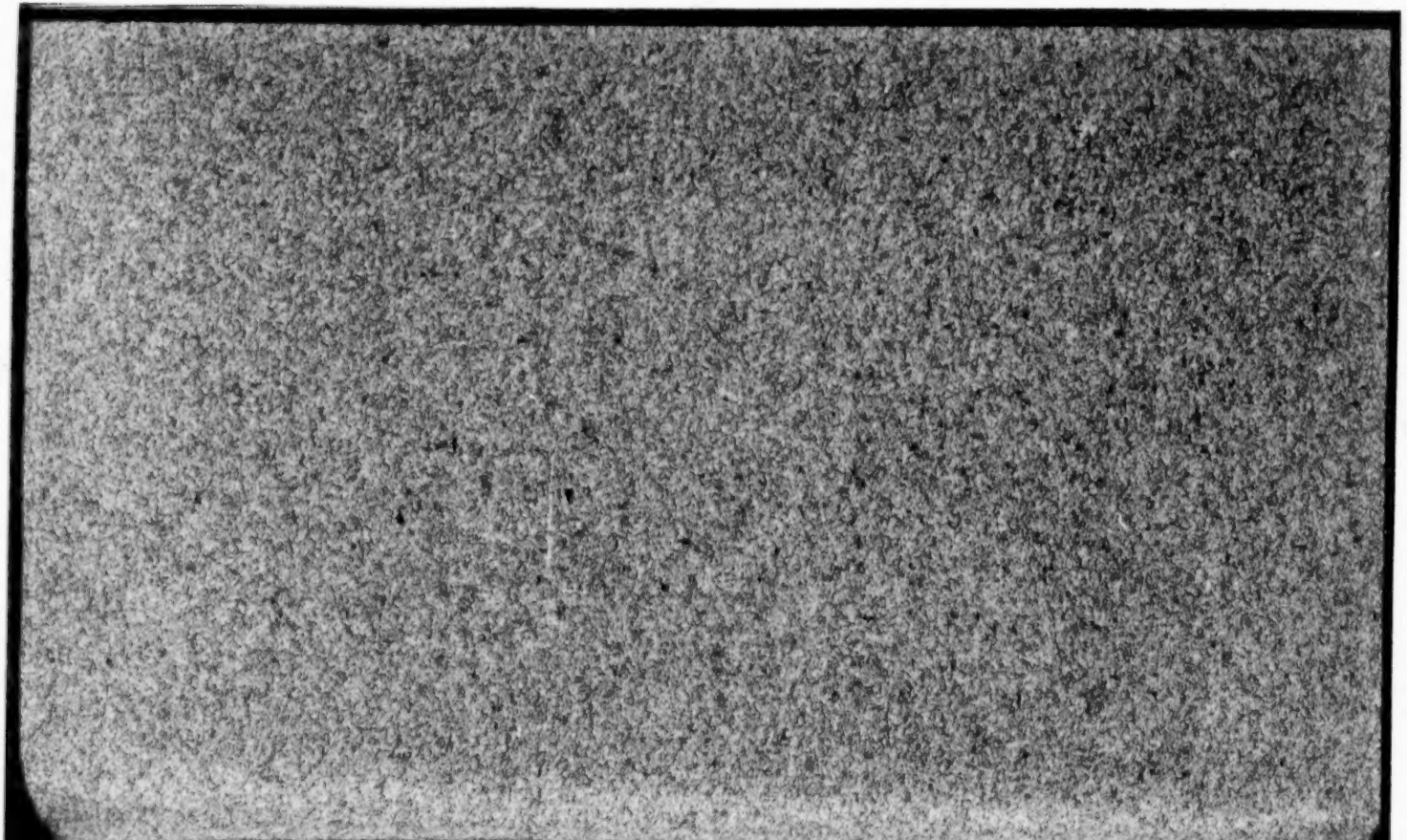
Number 23

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF RESPONDENT.

H. C. BROOKS,
W. M. HOTCHKISS,
Attorneys for Respondent.

BRADLEY PRINTING CO., TOPEKA



IN THE SUPREME COURT
OF THE
UNITED STATES

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY,
Petitioner,

vs.

BUD R. LATTA,
Respondent.

Number 523

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SUPPLEMENTAL BRIEF OF RESPONDENT.

H. C. BROME,
W. M. HOPEWELL,
Attorneys for Respondent.

This supplemental brief is submitted because the original brief of respondent filed in this case was prepared, served and filed prior to the receipt by counsel for respondent of the brief of petitioner, and is designed to answer such contentions of counsel for petitioner as are not discussed in respondent's original brief.

FIRST.

In the statement of facts in the brief of petitioner, the following statement is made: "Neither the Court nor the jury made any finding that the loss of said animals was caused by the petitioner either negligently or otherwise, and the evidence did not conclusively establish such fact." This statement is emphasized in the brief of petitioner. The original brief of respondent having asserted the loss of the animals, and the negligence of the carrier producing that result, to be undisputed facts, we deem it prudent to direct the attention of the Court to the state of the record touching this subject. The jury did find that the loss of the animals was caused by petitioner's negligence for they returned a general verdict for respondent which necessarily involved this finding. The evidence for respondent at the trial established the fact that the fire originated, or was first discovered, in the roof of the car in which the animals were being transported, it being the second car back from the engine. That the train was moving at the time the fire was discovered, that there was no other fire in the neighborhood, except the fire used to generate steam in the engine. That when the fire was discovered the train was stopped, and respondent, who was riding in the caboose of the train, went forward to the burning car; that at that time the animals were uninjured, and respondent could have safely removed them from the car without injury, and at-

tempted to do so; that the conductor in charge of the train refused to permit this to be done, but immediately uncoupled the car from the rest of the train, moved it to the nearest station one and one-half miles distant, and that when the car reached the station the fire had destroyed the animals.

The settled rule in Nebraska, and in the Federal Court in the Eighth Circuit, for many years has been, and is, that proof that property has been destroyed by sparks emitted by a locomotive creates a presumption of negligence on the part of the Railroad Company or its employees, either in the construction or handling of the engine, or in failing to keep it in proper repair.

McCullen vs. C. & N. W. Railroad Co., 101 Federal Reporter, 66.

U. P. Railroad Co. vs. Kellar, 36 Nebr., 189.

Rogers vs. K. C. & O. Railroad Co., 52 Nebr., 86.

Petitioner offered no evidence touching these matters at the trial, made no claim that the trial court should submit any issue of fact respecting the loss of the animals or the cause thereof to the jury, made no complaint in the Court of Appeals respecting the action of the trial court in that regard, and the specifications of error in this court do not present the question for review here. Under these circumstances the result here must be controlled by the conclusion reached respecting the validity of the

Limitation of Liability clause of the shipping contract.

SECOND.

The case of Texas & Pacific Ry. vs. Abilene Cotton Oil Co., 204 U. S. 42, is suggested in the brief of petitioner to present a situation similar to that in the case at bar. The provision under consideration there was as follows:

> "Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

In that case the Court found that the Congress had delegated to the Interstate Commerce Commission the duty of determining whether or not an interstate rate for the transportation of freight was a reasonable rate, and that the exercise of this power by that tribunal was inconsistent with the exercise of the same power by every court in the land, and that the proviso could not operate to retain for the shipper the right to invoke the judgment of a court in the first instance as to the reasonableness of the rate he was required to pay. And if it were true that in this case the Act of Congress had reserved to the Commission the duty of determining what amount of damages the carrier should pay in the event of the loss of the article being transported through the negligence of the carrier, or the rule that should be adopted in

measuring the shipper's damage in the event of such loss, there would be merit in petitioner's contention, but no such case is presented.

The power of the courts to determine whether or not an interstate shipment has been lost through the negligence of the carrier, the measure of the shipper's damage in that event, and in a proper proceeding in an ordinary suit at law by its judgment to ascertain, determine and enforce the shipper's rights in that behalf, is not at all impaired by the provisions of the Interstate Commerce Act. That tribunal has the exclusive power to determine what charge shall be made by the carrier for a specific service, and to order reparation if an excessive charge has been made, but it has not power to determine whether or not a spcific item of freight has been lost in transit through the negligence of the carrier, and to order reparation to the shipper for the loss so sustained. Nor has it the power to make a rule that shall measure the damages the shipper is entitled to recover in that event.

The duty of determining whether or not respondent's horses had been lost through the negligence of the carriers, and what, in that event should be the measure of his damages, devolved upon the court, and respondent invoked the jurisdiction of a competent tribunal in that behalf. The court determined that by the law of the place where the contract was made, the carrier was liable for all the loss he had sustained, and while conceding to the Congress plenary

power to authorize a limitation of liability with respect to interstate contracts of carriage, concluded that Congress had not undertaken to authorize any limitation of liability, but on the contrary had forbidden such limitations, and expressly declared that local laws of that character should remain in force and be given effect by the courts.

The contention of petitioner is that a Federal Statute, forbidding limitations upon liability by contract, shall be construed by this court as authorizing the very thing it inhibits. If it be true, as we contend it is, that the Federal Statute forbids any and all limitations of this character, then it may well be said that the Federal Statute occupies the whole field, and that there is no room for the operation of the local law. If limitations of this character are not forbidden by the Federal Statute, they are forbidden by the law of Nebraska, and that law does not conflict with, or interfere with, the operation of the Interstate Commerce Act in any manner, and in either event, the result in this case is the same. And the opinions in Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Company, *supra;* and the later cases of Atlantic Coast Line Railroad Company vs. Riverside Mills, decided by this court January 3rd, 1911; Western Union Telegraph Company vs. Commercial Milling Company, decided November 28th, 1910; Robinson vs. Baltimore & Ohio Railroad Company, decided January 9th, 1912; Southern Railway Company vs. Reed, decided January 9th, 1912; Northern Pacific Railway Com-

pany vs. State of Washington, decided January 9th, 1912; Mondou vs. New York, N. H. & R. I. Railroad Company, decided January 15th, 1912, are all, as we think, in harmony with the contention here made on behalf of respondent.

THIRD.

The claim that the provision of the contract to the effect that "It is agreed that the value of the animals shipped does not exceed of their kind per head the above named valuation" was equivalent to a representation by the shipper to the carrier that this sum was the actual value of the animals shipped, that the carrier relied upon this representation, and was thereby misled, and the shipper ought to be estopped thereby, finds no support in the pleadings or proof. The record discloses the fact that neither the shipper or carrier understood or supposed that any effort had been made by either to ascertain the actual value of the animals shipped. If the animals were only worth $15.00 per head the shipper could only recover that sum in the event of their loss, and the question of actual values was specifically eliminated from consideration by the terms of the contract itself.

The tariff was not discriminatory as published, it was open to everybody. The animal might be worth $10,000, and the carrier well advised of that fact, but the owner, as of right, is entitled upon executing the contract to have the shipment made at the tariff rate.

From whatever angle this controversy may be viewed, the result is the same—the carrier is seeking to asert its power by contract to limit its liability. Whatever the common law may have been, The State of Nebraska by its Constitution, and the Congress by its enactment, have undertaken to inhibit the exercise of this power, and we submit the effort has been successful.

Respectfully submitted,

W. M. HOPEWELL,

H. C. BROME,

Attorneys for Respondent.

23

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CLERK.

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1911

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY,
Petitioner,
vs.
BUD R. LATTA,
Respondent.

No. 231.

Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit

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Reply Brief of Petitioner

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SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1911

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY,
Petitioner,
vs.
BUD R. LATTA,
Respondent.
No. 523

Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit

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REPLY BRIEF OF PETITIONER

In reply to the brief filed by the respondent, attention is directed to the fact that this case is here on **certiorari** to the United States Circuit Court of Appeals, and is governed by the law of that jurisdiction. In this particular it differs from the cases of Penn. R. Co. vs. Hughes, 191 U. S. 477, and Chicago, etc., R. Co. vs. Solan, 169 U. S. 133, which came to this court on error to the Supreme Court of the state. It follows that, as to all questions of commercial law or general jurisdiction involved herein, this court is free to follow the law of this jurisdiction.

I.

Under the Tariffs and Classification, the respondent had the right to ship at a rate without any conditions attached thereto, or at a rate conditioned on the carrier assuming a liability only to the extent of an agreed value.

The material parts of the tariffs and classification applicable to the shipment in controversy, reprinted from the record, are as follows:

> "Limitation of Liability—Rates provided on livestock will apply on shipments made at owner's risk, with limitation of liability on the part of the railroad company as common carrier, under the terms and conditions of the current livestock contract provided by said company, the contract to be first duly executed in manner and form provided therein.
>
> "One hundred and fifty per cent of the rates named in this tariff will be charged on shipments made without limitation of carrier's liability at common law, and under this status shippers will have the choice of executing and accepting contracts for shipments of livestock with or without limitation of liability, the rates to be made as provided for herein." (Record, Page 6.)
>
> "Livestock. Ratings given below are based upon values declared by shippers, not exceeding the following, under contract:
>
> Each horse * * * $100.00
> Each colt (under 1 year) * * 50.00
> * * *
>
> Where the declared value exceeds the above an addition of 25 per cent will be made to the rate per 100 lbs * * for each 100 per cent, or fraction thereof, of additional declared value per head; animals exceeding in value $800.00 per head, or when no value is given, will be taken only by special arrangement. * * *

(2) Livestock L. C. L. (limited liability under contract, at values stated above), the following estimated weights: * *

(3) One horse, * * * 2,000 pounds..1

* * *

(8) Colts under one year, 750 pounds each .....1½"

* * *

(See Record, Pages 40 and 41.)

In explanation of the above, the letters L. C. L. mean less than carload lots, and the figures "1" and "1½" mean first-class and one and one-half times first-class.

The distance tariff applicable to the foregoing classification, prescribed a rate of 30 cents per hundred pounds on horses classed as first-class, and 45 cents per hundred pounds on colts classed as 1½ times first-class, for the carriage of horses and colts from Tekamah, Nebraska, to Council Bluffs, Iowa. (Record, Pages 7 and 41.)

The minimum rates applicable to the transportation of horses and colts, as shown by the foregoing tariffs and classification, were based on horses valued at $100.00 per head and on colts valued at $50.00 per head, conditioned on the carrier assuming liability only to the extent of such value. When the value of the animals was in excess of such values, the rates were graduated according to such excess value. In case the shipper did not value his animals, the tariff extended to him a rate 150 per cent higher than the minimum rate, based on the minimum value and conditioned as above.

In other words, when the respondent tendered his horse and colt for transportation, he had the alternative of rates based on their value, conditioned on the carrier assuming liability only to

the extent of such value, or of rates without any condition attached thereto. If his horses had been of the value of $100.00 each, he could have declared that value conditioned as above, and thereby secured the minimum rate on horses, which was 30 cents per hundred pounds, from Tekamah to Council Bluffs. If they had been of greater value than $100.00 per head, he could have declared the higher value, conditioned as above, and thereby secured a rate 25 per cent higher than the minimum rate for each 100 per cent of additional value. If he had declared the value at $300.00 per head, his rate would have been 45 cents per hundred pounds, instead of 30 cents. If he had preferred to place no value on his horses and to ship them without any limitation of liability on the part of the carrier, his rate would have been 150 per cent higher than the minimum rate based on the minimum value. If he had done so, his rate on the horse would have been 45 cents per hundred pounds and on the colt 67½ cents.

The livestock contract and shipping order, executed by the respondent, are supplemental to the tariffs and classification, and should be construed in connection therewith. The material parts of the contract are as follows:

> "The rates provided in the tariffs of this company are based upon the following value of animals named, to-wit:
>
> One hundred dollars per head on each horse.
>
> * * *
>
> And if this shipment is moved at the tariff rate it is agreed that the value of the animals shipped does not exceed, of their kind, per head the above named valuation.
>
> If the shipper declares a value in excess of the above valuation, and this shipment is moved at a rate based thereon, it is agreed

that the value of the animals shipped does not exceed such declared valuation, which is as follows:

Each horse * * per head....$100.00
Each ox or bull, per head.... .....
Each calf or hog, per head... .....
* * *

The shipment covered by this contract is accepted and forwarded subject to the agreed valuation, and the rate of freight is based on the condition that the railway company assumes liability only to the extent of such agreed valuation.

When the declared value exceeds the valuation on which the tariff rate is charged, an addition of 25 per cent will be made to such rate for each 00 per cent, or fraction thereof; additional declared value per head up to $800.00 per head." (Record, pages 30 and 31.)

The original contract has been duly certified to this court, and attention is directed thereto. In the blank left for the insertion of the value when the same was in excess of one hundred dollars, the figures "$100.00" were inserted. If the respondent desired to ship at an agreed valuation of one hundred dollars, it was unnecessary to insert these figures in this blank. The one hundred dollar valuation was the basis of the lowest rate, and was printed in the contract. For the apparent purpose of making assurance doubly sure that the agreed value was one hundred dollars, and not a value in excess thereof, the figures "$100.00" were written in this blank. The record is silent as to who wrote these figures or when they were written. The presumption, however, is that the question of value was considered when the contract was executed, and that the respondent either wrote in these figures or requested them to be written in.

or had knowledge of the fact that they were made a part of his contract:

The material parts of the shipping order are as follows:

> "The shipper may elect to accept the conditions printed on the back hereof, and as contained in the Bill of Lading of which this Shipping Order is a part, or may, as provided below, require the carriage of property at 'Carrier's risk,' * * * O Rel to Cont val. * * * B. R. Latta, Shipper. * * *
>
> If the shipper elects not to accept the said tariff rates and conditions, he should so notify the agent of the receiving carrier at the time his property is offered for shipment, and if he does not give such notice it will be understood that he desires his property carried subject to the conditions of the Bill of Lading, of which this order is a part, in order to secure the reduced rates thereon. Property carried not subject to the conditions of the Bill of Lading will be at the carrier's liability, limited only as provided by common law, and by the laws of the United States, and of the several states insofar as they apply. Property thus carried will be charged at the higher rating provided in current tariffs and classifications to apply when not shipped subject to the conditions of the Bill of Lading of which this is a part, and the cost of marine insurance will be added over any part of the route that may be by water." (Record, pages 36, 37.)

> "No. 16. Owner's Risk.—All property received and shipped O. R. (meaning owner's risk) is shipped subject to the conditions printed on the back of this receipt, and to all conditions, specified in general tariffs and classifications, and at a reduced rate by reason of the acceptance of such conditions. If the shipper does not accept such conditions he must give notice to the agent at the time of signing shipping bill, and by so doing may

> have goods forwarded subject only to conditions imposed by law, in which case additional charges will be made, as provided in general tariffs and classifications." (Record, page 39.)

This order also indicates that the respondent was given a choice of rates based on full or limited liability of the carrier. The abbreviations "O Rel to Cont val." meaning owner's release to contract valuation, indicates such choice on his part. The record is silent as to whether these abbreviations were written or printed in the shipping order. An examination of the subject matter of the order, however, warrants the inference that they were written in, thereby indicating that the respondent selected the minimum rate based on the minimum valuation.

II.

Summarized and restated with citations of recent cases, the contentions of the petitioner are as follows:

(1)

The Carmack Amendment and the Interstate Commerce Act supersede all state laws prescribing the terms and conditions of interstate bills of lading and defining the rights and obligations of carriers and shippers arising thereon.

By this amendment, Congress has exercised its power over the subject and has taken possession of the domain of regulation. It constitutes special legislation on the subject and fully covers the duties of carrier and shipper arising on such contracts. The subject not only admits of national regulation, but specially calls for it. The law of Nebraska declaring void certain provisions of such contracts is not in aid of the Commerce Act. On

the contrary, it is in direct conflict therewith and a burden on interstate commerce.

Southern R. Co. vs. Reid, 222 U. S. 424.

Northern Pac. R. Co. vs. Washington, 222 U. S. 370.

Mondou vs. New York, etc., R. Co., 223 U. S. 1.

Latta vs. Chicago, etc., R. Co., 172 Fed. 850, 97 C. C. A. 108.

(2)

A contract that the carrier shall assume liability only to the extent of an agreed value in consideration of a reduced rate does not "exempt" the carrier from its liability as imposed by the Carmack Amendment, or from its liability as it existed at common law.

(3)

The proviso to the Carmack Amendment does not reserve to the states power to enforce laws in conflict with the Amendment, or inconsistent with the purposes of the Commerce Act.

Robinson vs. Balt. & O. R. Co., 32 Sup. Ct. Rep. 114.

Texas & Pac. R. Co. vs. Abiline Cotton Oil Co., 204 U. S. 442, 446.

Balt. & O. R. Co. vs. Pitcairn Coal Co., 215 U. S. 481, 497.

Southern Pac. R. Co. vs. Crenshaw, 63 S. E. Rep. 865.

New York, etc., R. Co. vs. Interstate Com. Com., 200 U. S. 361.

Armour Packing Co. vs. United States, 209 U. S. 56, 72.

The decision of this case below by the United States Circuit Court of Appeals turned upon its

construction of this proviso. Commenting upon the Carmack Amendment, that court said:

> "It plainly appears from a reading of the above language that Congress has legislation on the subject of the liability of railroad corporations as common carriers when engaged in interstate commerce. If it were not for the proviso accompanying the language above quoted, we should feel compelled to determine the validity of the contract in question with reference to the law of Congress. We think that the proviso found in the law above quoted was placed therein to cover just such a case as is now presented. Congress undoubtedly was aware of the many conflicting decisions by the courts in reference to the question as to how far common carriers could limit their common law liability by contract, receipt, rule or regulation. It therefore was aware that the Constitution of Nebraska as interpreted by her Supreme Court, was in conflict with the rule established by the United States Supreme Court in Hart vs. Railway Company, supra; and was also aware that the Supreme Court of Pennsylvania in Grogan vs. Adams Express Co., 114 Pa. 523, refused to follow the rule established by said case of Hart vs. Railway Company, supra; and therefore, in view of these conflicting opinions, very wisely provided that the legislation by Congress should not deprive 'any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.' "
>
> (172 Fed. 850, 855.)

That court apparently gave no consideration to the purpose of the Commerce Act, or to the effect such a construction of the proviso would have on the questions of uniformity, equality and unjust discrimination.

III.

The Commerce Act and the Tariffs established pursuant therewith determine the Rights and Obligations of Shipper and Carrier. Such relations are fixed by the mandate of the law and are no longer contractual.

The conditions contained in tariffs and classifications are as binding on the parties as the rates named therein. The condition attached to the tariff under consideration was that the liability of the carrier be limited to the value declared by the shipper. Such a condition determine the aggregate of the rate and the value of the service to the shipper. To enforce it as to one shipper and waive it as to another would necessarily result in inequality and unjust discrimination. The shipper and carrier cannot by contract vary the rate or waive the conditions attached thereto. It follows, therefore, that such conditions cannot be waived or nullified by state legislators or state courts and must be observed until Congress or the Interstate Commerce Commission declare otherwise.

Chicago & Alton R. Co. vs. Kirby, 32 Sup. Ct. Rep. 648.

Armour Packing Co. vs. United States, 209 United States, 57, 72.

Arkansas Fertilizer Co. vs. United States, 103 Fed. 667.

In Re Released Rates, 13 I. C. Rep. 550.

IV.

Assuming, arguendo, that the proviso does reserve to the states power to enforce laws in conflict with the Carmack Amendment, and inconsistent with the purposes of the Commerce Act, and that the status created by the Commerce Act and tariffs filed pursuant therewith, does not control the issue

here presented, the following reasons exist why the respondent should not recover more than the agreed value:

(1)

The Constitution of Nebraska, as construed by its Supreme Court, forbids common carriers from limiting their liability as it existed at common law, and the rule of the Federal Court is that the contract under consideration does not limit such liability.

The construction of its Constitution by the Nebraska Court is controlling. The question, however, of what constitutes a limitation of liability as it existed at common law is one of commercial law, and this court is free to apply its own rule as announced in Hart vs. Penn. R. Co., 112 U. S. 331.

(2)

A contract that a carrier shall assume liability only to the extent of an agreed value, in consideration of a reduced rate, estops the shipper from recovering damages in excess of the agreed value.

(3)

A false valuation made for the purpose of securing a lower rate is denounced as a crime by the Commerce Act and the Elkins Act, and public policy forbids the recovery of damages in excess of the agreed value.

Taenzer & Co. vs. Chicago, etc., R. Co., 191 Fed. 543.

Respectfully submitted,

JAMES B. SHEEAN,

Attorney for Petitioner.

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In the Supreme Court of the United States

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,
Petitioner,

vs.

BUD R. LATTA,
Respondent.

No. [redacted]

Brief of Respondent in Opposition to Petition for Writ of Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

H. C. BROME,
W. M. HOPEWELL,
Counsel for Respondent.

OMAHA PRINTING CO., OMAHA

In the Supreme Court of the United States

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,
Petitioner,

vs.

BUD R. LATTA,
Respondent.

Brief of Respondent in Opposition to Petition for Writ of Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

STATEMENT.

This suit was commenced on the 6th day of November, 1907, by respondent, against the petitioner in the District Court of Burt County, Nebraska.

Petitioner removed the cause to the Circuit Court of the United States for the District of Nebraska, on the ground of a diversity of citizenship. The claim of the respondent, set forth in his second amended petition, upon which the cause was tried, may be summarized as follows:

Petitioner is a common carrier, operating a line of railroad through Nebraska and adjoining states,

and on the ninth day of May, 1907, respondent delivered to it two horses of the value of Three Thousand Dollars, at the city of Tekamah, on its line of railroad in Nebraska, to be transported over petitioner's line of railroad and connecting lines, to the city of Waterloo, in the State of Iowa, and paid defendant for such transportation over its line the sum of Twenty-four Dollars and thirty-eight cents ($24.38), advance freight.

On the same day, and while the car containing respondent's animals was enroute near the village of Tyson, in Washington County, Nebraska, and upon petitioner's line of railroad, the negligent construction and operation of the engine pulling the train of which this car was a part, permitted the escape of cinders and coals of fire from its smokestack to the roof of the car containing the animals, originating a fire that destroyed the car and its contents. The petition charges negligence in the origin of the fire, and also negligence in the fact that petitioner's servants and agents in charge of the train refused to allow respondent, who was a passenger upon the train, to remove the animals from the burning car after the fire was discovered and before they were injured, which he claims he was able, willing and offered to do. He sought to recover judgment for the value of the animals, $3,000, and advance freight

paid, $24.38, with interest from the ninth day of May, 1907.

The answer of petitioner admits that it is a common carrier of freight from the city of Tekamah to the city of Omaha, Nebraska, and into other states, particularly the State of Iowa, admits the receipt of the horses for transportation from Tekamah to Waterloo, and admits that the animals were burned to death on the ninth day of May, 1907, while in transit and in petitioner's possession.

For a separate defense it alleged that it was an interstate carrier, subject to the regulation and control of the laws of Congress relative thereto, and that by virtue of these laws it was required to file with the Interstate Commerce Commission and to publish its schedule of rates and charges and all rules and regulations in any manner made by it affecting the charges to be made for the transportation of property. That at the time respondent's property was destroyed, it had filed with the Interstate Commerce Commission its schedules of rates and charges, and its rules and regulations applying to the shipment of live stock, and that by its rules and regulations and tables then on file, it was provided as follows:

> "Limitation of Liability. Rates provided on Live Stock will apply on shipments made at

owner's risk, with limitation of liability on the part of the railroad company as common carrier under the terms and conditions of the current live stock contract provided by said company, the contract to be first duly executed in manner and form provided therein.

150 per cent of the rates named in this Tariff will be charged on shipments without limitation of carrier's liability at common law, and under this status shippers will have the choice of executing and accepting contracts for shipment of live stock with or without limitation of liability, the rates to be made as provided for herein."

Petitioner further alleges that under and by virtue of the tariffs of the petitioner company and the Western Classification No. 42, duly adopted, filed with the Interstate Commerce Commission and published as required by law, and in effect at the time of the shipment complained of, it was provided, among other things, that the

"Ratings given below are based upon values declared by shippers, not exceeding the following, under contract: Each horse or pony (gelding, mare or stallion), mule or jack, $100.00. Each colt (under one year), $50.00. * * * * Where the declared value exceeds the above an addition of 25 per cent will be made to the rate per 100 lbs. or car for each 100 per cent or frac-

tion thereof, of additional declared value per head; animals exceeding in value $800.00 per head, or when no value is given, will be taken only by special arrangement."

That the valuation of the animals made in the contract of shipment was one hundred dollars each, and that the laws of the United States prevent the petitioner from paying a larger sum to the owner on account of their loss in transit by the negligence of the carrier.

Respondent's reply admits that the tariffs and schedules or rates in force at the date the shipment was made, were on file in the office of the Interstate Commerce Commission of the United States, but alleges that the contract of carriage in this case was made within the State of Nebraska, and subject to the laws thereof, and that insofar as the same sought to limit the liability of the petitioner for the loss of said animals while in transit, it was wholly void, and denies the right or duty of the petitioner to file with the Interstate Commerce Commission any rule or regulation in violation of law, or any contract containing an unlawful limitation of its liability.

A trial was had at the October, 1908, term of the Circuit Court for Nebraska, resulting in a directed verdict and a judgment thereon in favor of respondent for $200.00. Respondent claiming that under

the pleadings and evidence he should have recovered a much larger sum, sued out a writ of error to the Circuit Court of Appeals for the eighth circuit, and on the 26th day of July, 1909, that Court reversed the judgment of the Circuit Court for the district of Nebraska and remanded the cause to that court for a new trial, the opinion of the court being as follows:

"Latta brought this suit in a state court in Nebraska against the Chicago, St. Paul, Minneapolis & Omaha Railway Company to recover damages from it as a common carrier for the breach of a contract to transport from Tekamah, Nebraska, to Waterloo, Iowa, one mare and colt. The petition alleges that, by the negligence of the defendant, said mare and colt were burned while being transported on the line of defendant's railway in the state of Nebraska, and claims damages to the amount of $3,024.38. The defendant removed the suit into the circuit court of the United States for the District of Nebraska, where it was tried by a jury. As a part of the cross-examination of the plaintiff, counsel for defendant offered in evidence the contract under which said property was to be transported, also a paper called a 'shipping order.' The offering of these instruments was objected to by counsel for plaintiff, but the trial court overruled the objection and admitted them in evidence. The plaintiff gave testimony tending to

prove the alleged negligence and how the loss and injury occurred. He then offered evidence tending to show that the value of the mare and colt was $2,500. Counsel for defendant objected to this testimony in regard to value on the ground that it was not competent for the plaintiff to prove any damage or loss in excess of that set out in the contract. Counsel for plaintiff then offered to prove by other witnesses the allegation of his petition. Whereupon the trial court ruled that the defendant was liable in any event for the loss of the mare and colt, but that it was only liable for the amount specified in the contract, and against the objection of counsel for plaintiff, directed the jury to return a verdict in favor of plaintiff in the sum of $220.09. It was shown at the trial that the rate of $24.38 charged by the defendant for the transportation of the animals mentioned was its regular tariff based upon the valuation stated in the contract. It was also conceded at the trial that said tariff rate had been filed with the Interstate Commerce Commission, and published as required by law, and that the rules, regulations and tariffs of the defendant on file with the Interstate Commerce Commission disclosed that the above named rate applied to the limited liability contract in use by the company for the transportation of live stock.

The errors assigned herein are that the court erred in refusing to permit the plaintiff to show the actual damage he had sustained, and in so charging the jury as to restrict their verdict to the sum above stated. The contract between plaintiff and defendant for the transportation of the mare and colt, so far as is material to the question now under investigation, was in the following language:

"Read this contract.

Chicago, St. Paul, Minneapolis & Omaha Railway Co.

It is the desire of this company that this contract shall be executed on all shipments of live stock in car load lots or less. In case shipper declines to execute this contract, the valuation of the live stock, as stated by the shipper, shall be stated on the shipping bill, and in such case the rates will be 10 per cent higher than they would be under this contract if he executed it. If the shipper declines either to state the value of the live stock on the shipping bill or execute this contract, the charges in that case will be ten per cent higher than the rates provided in this contract when the owner or shipper declares the value of the stock to be over $800 per head or declines to declare its value.

Nos. of Way-Bills C. G. W.	No. and Kind of Animals in each car. Shipper's count
	1 horse
	1 colt, 7501½
Initials and Nos. of cars	Live Stock Contract, Tekamah
5721	Station, 5-9-'07

This agreement entered into on the day above stated, between the Chicago, St. Paul, Minneapolis & Omaha Railway Company and B. R. Latta.

Witnesseth, That the said Railway Company has this day received from the said B. R. Latta, one horse to be transported from Tekamah, Nebr., station, to Waterloo, Ia., station, consigned to Joe McLaughlin, at D. O. at the rate of trf. per cwt. upon the terms and conditions following that is to say: The said Railway Company shall not be liable for the loss or death of, or any injuries received by any of such stock, unless the same is immediately caused by the willful misconduct or the actual negligence of the said Company, or its agents, servants or employes.

The rates provided in the tariffs of this company are based upon the following value of animals named, to-wit:

One hundred dollars per head on each horse or pony (gelding, mare or stallion), mule or jack.

Fifty dollars per head on each ox or bull.

Thirty dollars per head on each cow.

Ten dollars per head on each calf or hog.

Three dollars per head on each sheep or goat.

And if this shipment is moved at the tariff rate it is agreed that the value of the animals shipped does not exceed, of their kind, per head the above named valuation.

If the shipper declares a value in excess of the above valuation, and this shipment is moved at a rate based thereon, it is agreed that the value of the animals shipped does not exceed such declared valuation, which is as follows:

Each horse or pony (gelding, mare or stallion), mule or jack, per head.... $100.00
Each ox or bull..... .....
Each cow, per head..... .....
Each calf or hog, per head..... .....
Each sheep or goat, per head..... .....

The shipment covered by this contract is accepted and forwarded subject to the agreed valuation, and the rate of freight is based on the condition that the railway company assumes liability only to the extent of such agreed valuation.

When the declared value exceeds the valuation on which the tariff rate is charged, an addition of 25 per cent will be made to such rate for each 100 per cent or fraction thereof, additional declared value per head up to $800 per head. When

the owner or shipper declares the value to be greater than $800 per head, or declines to declare the value of the stock, charges will be based upon 200 per cent of the rate provided above, based on value of $800.'

The shipping order signed by plaintiff was in the following language:

'See Contract on Back of this Shipping Order.
Chicago, St. Paul, Minneapolis & Omaha
Railway Co.

Shipping Order.

Car No. 5721 (To be retained by Agent) No...
Initials of Car C. G. W. Tekamah, Station
5-9, 1907

(The shipper may elect to accept the conditions printed on the back hereof and as contained in the bill of lading of which this shipping order is a part, or may, as provided below, require the carriage of property at "Carrier's Risk").

Receive, carry and deliver the articles described below in accordance with the tariff and classification in effect at the date of this order and subject to the conditions of the bill of lading of which this shipping order is a part. (For carrier's liability see note below.)

Consignee, Destination, Marks and Routing	Articles	Weight subject to correction
	1 horse	
	1 colt under 1 year	2000
Joe McLaughlin Waterloo, Iowa	O rel to cont.val. S. L. & C.	750
Charges Advanced.	Paid to apply, $24.38	
	B. R. Latta, Shipper	
(In red ink across the face:)	Grain subject to Elevator Delivery.	

If the shipper elects not to accept the said tariff rates and conditions, he should so notify the agent of the receiving carrier at the time his property is offered for shipment, and if he does not give such notice it will be understood that he desires his property carried subject to the conditions of the bill of lading of which this order is a part, in order to secure the reduced rates thereon. Property carried not subject to the conditions of the bill of lading will be at the carrier's liability, limited only as provided by common law and by the laws of the United States, and of the several states in so far as they apply. Property thus carried will be charged at the higher rating provided in current tariffs and classifications to apply when not shipped subject to the conditions of the bill of lading of which this is a part, and the cost of marine insurance will be added over any part of the route that may be by water.

No. 16, Owner's Risk. All property received and shipped O. R. (Meaning owner's risk) is shipped subject to the conditions printed on the back of this receipt, and to all conditions, specified in general tariffs and classifications, and at a reduced rate by reason of the acceptance of such conditions. If the shipper does not accept such conditions he must give notice to the agent at the time of the signing of the shipping bill, and by so doing may have goods forwarded subject only to conditions imposed by law, in which case additional charges will be made, as provided in general tariffs and classifications.'

It appears from the record before us that the tariff rate for the transportation of live stock over defendant's road based upon a valuation of $100 each for horses is open to all shippers who will sign the contract prepared in such cases by defendant; that no shipper is entitled to the limited live stock rate unless he signs said contract; that the valuation thus fixed by the contract is arbitrarily fixed long prior to any particular shipment and has no reference to the actual value of any particular horse; that the shipper in order to obtain this limited live stock rate must declare the value of his horse to be $100. The contract in the case at bar said:

'If the shipper declares a value in excess of the above valuation, and this shipment is moved

> at a rate based thereon, it is agreed that the value of the animals shipped does not exceed such declared valuation, which is as follows: Each horse or pony (gelding, mare or stallion) mule or jack, per head, $100.'

In other words, if the shipper desires to avail himself of the limited valuation tariff rate, he has no option whatever but to declare his horse to be of the value placed on it by the defendant. There is no use contending that the contract in question was not a limitation of the defendant's common-law liability as a common carrier. The defendant so names it, and it conclusively appears that the limitation of liability is the primary purpose of the provision in regard to value. The question whether the limitation as to value is valid or not, is another proposition. Such a contract was upheld in Hart v. Pennsylvania R. R. Co., 112 U. S., 331, 5 Sup. Ct. 151, 28 L. Ed. 717; the Supreme Court stating the rule as follows:

> 'When a contract of carriage signed by the shipper is fairly made with a railroad company, agreeing on a valuation of the property carried, with a rate of freight based on condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss by the negligence of the carrier the contract will be upheld as a proper and lawful mode of securing a true proportion between the amount for which

the carrier may be responsible and the freight it receives and of protecting itself against ex travagant and fanciful valuations.'

The following cases also are in harmony with the rule above stated: Scruggs vs. Baltimore, etc., Ry. Co. (C. C. 5 McCrary, 590, 18 Fed. 318; Ormsby vs. U. P. R. R. Co. (C. C.) 4 Fed. 760; Judson vs. Western R. R. Corporation, 6 Allen (Mass.) 486, 83 Am. Dec. 646; Adams Express Co. vs. Stettaners, 61 Ill. 184, 14 Am. Rep. 57; Ga. Pacific Ry. Co. vs. Hughart, 90 Ala., 36, 8 South. 62; Ullman vs. C. & N. W. Ry. Co., 112 Wis., 150, 88 N. W., 41, 88 Am. St. Rep. 949; Railway Co. vs. Sowell, 90 Tenn. 17, 15 S. W. 837, Rosenfeld vs. Peoria, Decatur & Evansville Ry. Co., 103 Ind. 121, 2 N. E. 344, 53 Am. Rep. 500; Western Railway Co. vs. Harwell, 91 Ala. 340, 8 South. 649; 4 Elliot on Railroads, 2336; 14 L. R. A. pp. 434, 435, note; 1 Hutchinson, Carriers, sec. 427, and cases cited. But these cases all deal with the power of common carriers to limit their common law liability in the absence of a statute restricting such power. The Constitution of Nebraska in article 11, Sec. 4, provides: "The liability of railroad corporations as common carriers, shall never be limited." This language by an unbroken line of decisions by the Supreme Court of Nebraska has been construed as

avoiding all attempts to limit the common law liability of railroad corporations as common carriers. Missouri Pacific R. Co. vs. Vandeventer, 26 Neb. 222, 41 N. W. 998, 3 L. R. A. 129; St. Joseph & Grand Island R. Co. vs. Palmer, 38 Neb. 463, 56 N. W. 957, 22 L. R. A. 335; Union Pacific R. Co. vs. Metcalf, 50 Nebr. 452, 69 N. W., 961; C. B. & Q. R. Co., vs. Gardiner, 51 Nebr., 70, 70 N. W. 508; Wabash R. Co. vs. Sharpe, 76 Nebr. 424, 107 N. W., 758, 124 Am. St. Rep. 823. The case of C. B. & Q. vs. Gardiner, 51 Nebr. 70, 70 N. W. 508, involved the shipment of a horse from Peoria, Ill., to Hastings, Neb. The value of the horse was agreed to be $100 in the contract of shipment, and in connection therewith was the following language:

> 'And that the above rate of transportation is based upon the agreement that in case of loss or damage, whether resulting from accident or negligence of said railroad company or its servant, said railroad company does not assume a liability for such loss or damage to exceed the valuation of each animal.'

The Supreme Court of Nebraska, held this provision of the contract void, although it was contended that the contract was good in Illinois, where it was made. The law as stated in the Constitution of Nebraska as interpreted by her Supreme Court in the

absence of legislation by Congress is clearly applicable to contracts involving interstate commerce. Chicago, Milwaukee & St. Paul Railway Company vs. Solan, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688; Pennsylvania R. R. Co. vs. Hughes, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268. The contract in question was a Nebraska contract, and her constitution as interpreted by her Supreme Court, which interpretation is binding on us, struck down the limitation of the right of recovery in said contract as soon as it was made. Chicago, Milwaukee & St. Paul Railway Company vs. Solan, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688; Pennsylvania R. R. Co. vs. Hughes, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268.

It is claimed, however, that Congress has legislated upon the very subject now under discussion, and that in consequence thereof the law of Nebraska, so far as it is sought to enforce the same against the provisions of a contract in relation to Interstate Commerce, is inoperative. In this connection our attention is called to Act June 29, 1906, c. 3591, sec. 7, 34 Stat. 595, (U. S. Comp. St. Supp. 1907, p. 909). In the section referred to is found the following language:

> 'That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in

another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.'

It plainly appears from a reading of the above language that Congress has legislated upon the subject of the liability of railroad corporations as common carriers when engaged in interstate commerce. If it were not for the proviso accompanying the language above quoted, we should feel compelled to determine the validity of the contract in question with reference to the law of Congress. We think that the proviso found in the law above quoted was placed therein to cover just such a case as is now presented. Congress, undoubtedly, was aware of the many conflicting decisions by the courts in reference to the question as to how far common carriers could limit their common-law liability by contract, receipt, rule

or regulation. It therefore was aware that the Constitution of Nebraska as interpreted by her Supreme Court was in conflict with the rule established by the United States Supreme Court in Hart vs. Railway Company, supra; and was also aware that the Supreme Court of Pennsylvania in Grogan vs. Adams Express Company, 114 Pa. 523, 7 Atl. 134, 60 Am. Rep. 360, refused to follow the rule established by said case of Hart vs. Railway Company, supra; and therefore, in view of these conflicting opinions, very wisely provided that the legislation by Congress should not deprive "any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

We are therefore of the opinion that the right which the plaintiff in this case had under the law of Nebraska to sue for the full value of his property, was not taken away by the legislation of Congress herein referred to, but was preserved to him, and that he may now enforce that right as he has attempted to do.

It results that the judgment of the trial court must be reversed and a new trial granted, and it is so ordered."

No petition for certiorari was lodged with this court respecting that judgment, and agreeably to the rules of the Circuit Court of Appeals for the Eighth

Circuit its mandate reversing the judgment and ordering a new trial was filed with the Clerk of the Circuit Court for the District of Nebraska, the cause placed upon the trial docket and a trial had on the 16th day of April, 1910, resulting in a verdict and judgment for respondent in the sum of $3,583.00.

At this trial the Railway Company did not contest the contention that the animals were destroyed by reason of its negligence, or the correctness of Latta's claim as to their value at the time of their loss, and the record at the second trial is a fac simile of that made upon the first trial, except that Latta was permitted to offer additional evidence substantiating his claim as to the value of the animals destroyed, and the tariff alleged by the Railway Company's answer and admitted by Latta's reply to have been on file with the Interstate Commerce Commission and duly published at the time the contract was entered into, was received in evidence whereas it had been excluded as immaterial by the court upon the former trial. From this judgmnt petitioner sued out a writ of error to the United States Circuit Court of Appeals for the eighth circuit, where the judgment rendered at the circuit was affirmed on the 10th day of January, 1911. The affirmance proceeding upon the theory that the issues upon the second trial having been precisely the same as those presented at

the first trial, and there being no substantial change in the evidence, the assignments of error under the second writ presented only questions that had been considered and determined by the Court of Appeals upon the prior hearing; not open for reconsideration and rehearing upon the second writ of error. By this proceeding petitioner seeks to procure a review of the case by this court.

ARGUMENT.

I.

PETITION FOR CERTIORARI COMES TOO LATE.

It may be conceded for the purpose of this objection that the question whether or not the provisions of the Federal Interstate Commerce act as amended, supersede all state laws designed to prevent common carriers from contracting for exemption from liability, predicated upon their own negligence; is important enough to invite consideration and determination by this court. But assuming this to be so, we respectfully submit that this application for certiorari comes too late. The decision of the Circuit Court of Appeals for the Eighth Circuit holding that the Congress had expressly reserved to respondent the right to assert the invalidity of the "Limitation of Liability" clause of the contract in

question, because the constitution of Nebraska as construed by the highest court of the State, declared it invalid; was announced and embodied in the judgment of that court on the 26th day of July, 1909. If petitioner thought this decision was wrong it might have applied for certiorari to this court immediately, or under the rule announced in The Conqueror, 166 U. S., page 110; Ayres vs. Polsdorfer, et al., 187 U. S., page 585, and Bonin vs. Gulf Co., 198 U. S. 115, within one year from the date of the entry of judgment, but not afterward. Instead of pursuing that course petitioner followed the mandate of the Circuit Court of Appeals back to the Circuit Court for the District of Nebraska, subjected respondent to the annoyance and expense incident to a re-trial of the case in the Circuit Court, prosecuted a second writ of error to the Circuit Court of Appeals, and now, nearly two years after the rendition of the judgment and the declaration of law of which it really complains, applies to this court for relief.

That this court may take jurisdiction of a case by certiorari at any stage of the proceedings in the court below, either before or after judgment, must be conceded, but the authorities cited *supra* definitely and certainly establish the rule that the application for certiorari must be made must be made with-

in one year after the date of rendition of the judgment, respecting which complaint is made.

It is true that the final judgment in favor of respondent was entered by the Circuit Court of Appeals for the Eighth Circuit, on the tenth day of January, 1911, but it is likewise true, that the judgment of the Circuit Court of Appeals for the Eighth Circuit really sought to be reviewed in this proceeding, was entered on the 26th day of July, 1909, almost two years prior to the date of the application for certiorari. In that decision and judgment the law of the case was declared, and necessarily followed by the Circuit Court upon the second trial.

Upon the second writ of error the Court of Appeals was not at liberty to announce a different rule, even though it were of the opinion that its prior decision was erroneous. No other or different question was presented upon the second writ of error, and the real purpose of the present petition for certiorari is to procure this court to take jurisdiction of this cause and review and reverse the decision of the Circuit Court of Appeals, entered July 26, 1909.

That the judgment entered upon the second writ of error was the only one permissible upon the record as it then stood, is perfectly clear.

Petitioner sinned away its day of grace, and ought not now to be permitted to invoke the jurisdiction of this court respecting a judgment rendered nearly two years before the petition for certiorari was lodged here.

II.

THE OPINION AND JUDGMENT OF THE CIRCUIT COURT OF APPEALS UPON THE MERITS IS RIGHT.

Admitting the importance of the question determined in this case, we submit that the correctness of the conclusioin reached by the Court below is not open to serious question. We have set forth in the statement contained in this brief the opinion of the learned Circuit Judge, who spoke for the Circiut Colurt of Appeals, and cannot hope, by argument here, to make clearer or more cogent the reasons assigned by the court for the conclusion reached and judgment entered by it. If we were to assume that the Circuit Court of Appeals was wrong in its conclusion, and that the right of action and remedy reserved to the shippers, under existing law by the express terms of the Act of Congress, is not the right of action invoked in this case, the result would be the same:

1. Because in the case of Chicago, M. & St. P. R. Co. vs. Solan, 169 U. S., 133, this court determined

that regulations relating to contracts made by carriers, of the character in question here,

> "Are not, in themselves, regulations of interstate commerce, although they control in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits. * * * It is in no just sense a regulation of commerce. It does not undertake to impose any tax upon the company, or to restrict the persons or things to be carried, or to regulate the rate of tolls, fares or freight. Its whole object and effect is to make it more sure that railroad companies shall perform the duty, resting upon them by virtue of their employment as common carriers, to use the utmost care and diligence in the transportation of passengers and goods."

In the later cases of Pennsylvania R. Co. vs. Hughes, 191 U. S. 477, and Martin vs. Railroad, 203 U. S. 284, the doctrine of the Solan case was reaffirmed.

It is true that these cases were all decided prior to the amendment to the Interstate Commerce Act of June 29, 1906, and it is true that that amendment

quoted in the opinion of the Court of Appeals, supra, does relate to the subject under discussion. It is likewise true that the subject is one over which the Congress has undoubted jurisdiction, and if there be a conflict between the state regulation and the federal enactment, the federal rule must prevail, but it cannot be said that there is anything in the provisions of the Interstate Commerce Act anywhere, militating against the exercise of the police power of the States in aid of interstate commerce, although such enactments may incidentally effect such commerce, so long as they do not impose a burden upon it, and this conclusion is supported by the reasoning of this court in Western Union Telegraph Co. vs. Commercial Milling Company, decided by this court November 28, 1910, and Chicago and Rock Island Railway Company vs. State of Arkansas, decided February 20, 1911.

2. Because the provision of the constitution of Nebraska under consideration, as construed by the highest court of that State, is in entire harmony with the federal rule as declared in the provision of the Interstate Commerce Act. The declaration that a railroad

> "Shall be liable * * * for any loss, damage or injury to such property caused by it. * * * And no contract, receipt, rule or regulation shall ex-

> empt such common carrier, railroad or transportation company from the liability hereby imposed."

is not a declaration of the common law as construed by this court in Hart vs. Pennsylvania R. R. Co., 112 U. S., 330, but was and is a declaration of the rule announced in the Nebraska cases by reason of its constitutional provision, and in Railroad vs. Solan, supra, by reason of the statutory provision of the State of Iowa. Any other construction would fail to express the true meaning and intent of the language used in the statute.

The Supreme Court of Iowa, in an opinion announced November 16, 1910, reported in Volume 128, Northwestern Reporter, at page 663, was confronted with the same contention made here. After pointing out the fact that that court, by a long line of decisions, had held an agreement limiting the liability of a common carrier in this manner, not only prohibited by the terms of the Iowa statute, but void at common law as against public policy said

> "It is urged, however, that the cited cases were all decided prior to the enactment of the interstate commerce law and that they are no longer applicable. But this contention avails little to the defendant, because we find nothing in the interstate commerce law which supersedes in any manner the rule of liability which may

obtain in the different states. The following excerpt from the interstate commerce act comprises all that is contained therein that is in any degree pertinent to this question: 'That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state, shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury, to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed; provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.' On the face of it, this provision is rather confirmatory than otherwise of the rule which obtains in this state. That such rule presents no conflict with the act seems to have been held in Pennsylvania R. Co. v. Hughes, 191 U. S., 477, 24 Sup. Ct. 132, 48 L. Ed. 268."

The same contention was made in the Supreme Court of Nebraska in Miller vs. C. B. & Q. R. Co., 85 Nebr., 458, and the act of the Congress under consideration here held not to in any manner supersede

or amend the existing law with reference to the liability of a common carrier for its negligence in transporting of property by interstate shipments.

The suggestion that respondent perpetrated a fraud upon petitioner and that petitioner relied upon the printed limitation of value contained in its contracts as being the true value of the animals, at the time of the shipment, is not supported by their pleading or proof. The tariff rate published by petitioner authorized the transportation of horses over its road, based upon a valuation of $100.00 each. It was intended to and it did authorize and invite all shippers to transport all kinds of horses, at the tariff rate, provided the shipper would agree in advance to declare the value of the animal to be $100.00. The Court of Appeals well said:

> "There is no use of contending that the contract in question was not a limitation of the defendant's common-law liability as a common carrier. The defendant so names it, and it conclusively appears that the limitation of liability is the primary purpose of the provision in regard to value."

It may well be that a carrier may base its charges upon the value of the article shipped and charge a higher price for the increased risk incident to the transportation and care of the more valuable

article, and that the shipper who falsely, and for the purpose of obtaining the lower rate misstated the value of his property, would be estopped as against a carrier who had relied upon his false statement as to value, and been induced to carry the article at a lower rate by reason thereof, from asserting the true value, as against the carrier when the article was lost or destroyed, but that question is not presented by the record, or involved in this case in any manner.

In conclusion, we submit that whether we measure the rights of the parties to this litigation by the undoubted rule in force prior to the amendment to the Interstate Commerce Act, or seek to adjust them solely with reference to the provisions of that amendment, the result is the same. The judgment complained of reflects a correct exposition of the rights of the parties, and the petition for certiorari should be denied.

BUD R. LATTA,
Respondent.

By

H. C. BROME,
W. M. HOPEWELL,
His Attorneys.

Supreme Court, U. S.
FILED.
FEB 28 1911
JAMES H. McKENNEY,

THE SUPREME COURT OF THE UNITED STATES

231.

No. [redacted]

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,
Petitioner,

v.

BUD R. LATTA,
Respondent.

Petition for writ of *certiorari* requiring the Circuit Court of Appeals for the Eighth Circuit to certify to the Supreme Court, for its review and determination, the case of *Bud R. Latta, Plaintiff in Error, vs. Chicago, St. Paul, Minneapolis and Omaha Railway Company, Defendant in Error.*

TO THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, the Chicago, St. Paul, Minneapolis and Omaha Railway Company, respectfully represents to this Honorable Court as follows:

I.

That on the 6th day of November, 1907, Bud R. Latta, respondent herein, as a citizen and resident of the state of Nebraska, filed in the office of the clerk of the district court of the state of Nebraska in and for Burt County in said state, a petition against your petitioner

herein, a citizen and resident of the state of Wisconsin, praying judgment against it in the sum of $3,024.38, with interest and for costs of suit, on account of the alleged loss by fire of two horses while being transported as an interstate shipment from Tekamah in Burt County, state of Nebraska, to Waterloo in the state of Iowa; that said cause was thereafter removed (Record pp. 65 to 70 inc.) to the United States Circuit Court for the District of Nebraska, Omaha Division, in which court the same was tried, upon issues presented by proper pleadings (Record pp. 1 to 22 inc.)

II.

It was conceded by the pleadings and undisputed evidence that the respondent lived at Tekamah; shipped a mare weighing 2,000 lbs. and a colt weighing 750 lbs. on the 9th day of May, 1909, from Tekamah, Nebraska, bound for Waterloo, Iowa; that both animals were burned while in transit in petitioner's car shortly after starting on said journey; that at and before the time of delivering said animals for shipment this petitioner had on file its rules, regulations and tariffs and classifications with the Interstate Commerce Commission, which were published according to law, and were in force at said time controlling live-stock shipments of the kind in controversy and by said rules, regulations, tariffs and classifications, it was specifically provided:

"Ratings given below are based upon values declared by shippers not exceeding the following under contract:

Each horse or pony (gelding mare or stallion), mule or jack.....$100.00
Each colt (under one year)..... 50.00

"Where the declared value exceeds the above an addition of 25 per cent will be made to the rate per 100 lbs. or car for each 100 per cent, or fraction thereof, of additional declared value per head; animals exceeding in value $800 per head, or when no value is given, will be taken only by special arrangement * * *"

"Live Stock L. C. L. (limited liability under contract, at values stated above), the following estimated weights (exceptions to Rule 1), viz: One horse (gelding or mare), or pony, mule or domestic horned animal (except bulls), N. O. S., 2,000 lbs.; two animals 3,500 lbs. * * * 1." (the figure 1 meaning first-class rate.) (Record p. 46, Exhibit 3).

That before delivering said animals for shipment the respondent herein made a declaration to petitioner's agent at Tekamah, Nebraska, that the value of each of said animals was $100, for the express purpose of obtaining the rate per hundred pounds shown and authorized by the rules, regulations and tariffs on file with the Interstate Commerce Commission of the United States and published as required by law, being an aggregate sum of $24.38, which was paid by respondent to the petitioner and was included in the amount sought to be recovered in the trial court. That according to said rules, regulations, tariffs and classifications the standard rate for the kind of shipment involved herein was fixed at a stated number of cents per hundred pounds for each $100 of valuation, and such rate per hundred pounds increased as the valuation increased. At the trial, respondent seeking to sustain the allegations of his petition, testified that the animals were worth $3,000,—viz: the mare $2,500.00 and the colt $500.00,—contrary to his declaration of value made at the time of tendering them for shipment, and which secured for him the lower rate.

(b) That the contract being primarily one to limit the carrier's common law liability, the decisions upholding such contracts were not applicable to the present case, since

> "The constitution of Nebraska in Article 11, Section 4, provides:
>
> > 'The liability of railroad corporations as common carriers shall never be limited.'
>
> The contract in question was a Nebraska contract and her constitution, as interpreted by her supreme court, which interpretation is binding on us, struck down the limitation of the right of recovery in said contract as soon as it was made."

(c) That the legislation of Congress upon the subject of interstate commerce is not effective to destroy the operation of the law of Nebraska upon the provisions of a contract covering an interstate shipment.

> "In this connection our attention is called to Section 20, Chapter 3591, 34 Stat., 595. In the section referred to is found the following language:
>
> > 'That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.'

It plainly appears from a reading of the above language that Congress has legislated upon the subject of the liability of railroad corporations as common carriers when engaged in Interstate Commerce. If it were not for the proviso accompanying the language above quoted we should feel compelled to determine the validity of the contract in question with reference to the law of Congress. We think that the proviso found in the law above quoted was placed therein to cover just such a case as is now presented. Congress, undoubtedly, was aware of the many conflicting decisions by the courts in reference to the question as to how far common carriers could limit their common law liability by contract, receipt, rule or regulation. It, therefore, was aware that the Constitution of Nebraska as interpreted by her Supreme Court, was in conflict with the rule established by the United States Supreme Court in *Hart v. Railway Company, supra;* and was also aware that the Supreme Court of Pennsylvania in *Grogan v. Adams Express Company,* 114 Pa., 523, refused to follow the rule established by said case of *Hart v. Railway Company, supra;* and therefore in view of these conflicting opinions very wisely provided that the legislation by Congress should not deprive 'any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.' "

IV.

That thereafter said cause having been remanded to the Circuit Court of the United States for the District of Nebraska, Omaha Division, on the 16th day of April, 1910, a second trial was had therein, resulting in a verdict of the jury, directed by the court, for the sum of $3,583.00, upon which judgment was then entered with costs of the action; and in so doing, the trial court endeavored to act in harmony with the opinion accompany-

ing the reversal of its former judgment by said Circuit Court of Appeals.

Thereupon this petitioner took error proceedings to said Circuit Court of Appeals for the Eighth Judicial Circuit and upon hearing and argument had in said court on the 10th day of January, 1911, the judgment of said Circuit Court for the District of Nebraska, so last rendered as aforesaid, was affirmed.

V.

The following admission was made by counsel for respondent Latta at each of the trials of said cause:

> "I am willing to admit that the tariffs and schedules of rates in force and in use by defendant in making the contract with the plaintiff for the shipment of said mare and colt, was in fact, at the date said contract was made, not only filed in the office of the Interstate Commerce Commission, but published as required by law, and I admit that Exhibit 3 is the tariff referred to." (Record p. 45.)

In the progress of the first trial counsel for this petitioner, the railway company, offered in evidence defendant's Exhibit 3 (as the same appears at Record page 46), which contained so many of its rules, regulations, tariffs and classifications on file with the Interstate Commerce Commission and published according to law, as are applicable to, and as controlled, the shipment in question, which was objected to as incompetent, irrelevant and immaterial, and the objection sustained by the trial court, thus barring said Exhibit 3 as evidence.

Thereupon this petitioner took error proceedings to said Circuit Court of Appeals for the Eighth Circuit,

and upon hearing and argument had in said court on the 10th day of January, 1911, the judgment of said Circuit Court for the District of Nebraska, rendered as aforesaid, was affirmed on the 11th day of January, 1911, and the court entered its order of affirmance as follows:

"United States Circuit Court of Appeals, Eighth Circuit. December Term, 1910, Wednesday, January 11, 1911.

Chicago, St. Paul, Minneapolis and Omaha Railway Company,
Plaintiff in Error,
vs.
No. 3444.
Bud R. Latta.

In Error to the Circuit Court of the United States for the District of Nebraska.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Nebraska, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court, in this cause, be, and the same is hereby, affirmed with costs on the authority of the opinion of this Court in the former cause between the same parties (172 Fed., 850; 97 C. C. A., 198); and that Bud R. Latta have and recover against the Chicago, St. Paul, Minneapolis and Omaha Railway Company the sum of twenty dollars for his costs herein and have execution therefor.

January 11, 1911."

(Record p. 72).

That at the second trial of said cause the same objection to the admission of said exhibit 3 as evidence was made by counsel for respondent; but, contrary to the ruling upon the former trial, the objection was overruled and exhibit 3 was received in evidence.

At the first trial in the Circuit Court for the District of Nebraska, and at the first hearing in argument, on error proceedings brought by the respondent herein in the Circuit Court of Appeals for the Eighth Circuit, the validity of the "limitation of liability" clause in the contract or bill of lading issued by the carrier was apparently the controlling feature in the mind of the court, in arriving at a conclusion as to the right of the respondent to recover the full value of the animals; that neither at said first trial in the trial court, nor at the hearing, nor in the opinion rendered thereon by the appellate court, was consideration given to the fact that the rights of the parties in respect to the tariff, rates and rules and regulations governing the same were fixed by a condition or status raised by law, independent of contract between the parties, which neither the shipper nor the carrier could change or modify.

Upon the second trial the trial court admitted exhibit 3, thereby making it certain, even if a doubt existed before, that the rights of the parties were controlled exclusively by the laws of the United States in respect to the charges for transportation of interstate shipments, and the method of their determination, and not by contractual relations between the carrier and the shipper.

VI.

That the matter involved in said litigation is one of great public interest and importance throughout the United States, wherever commerce is moved by common carriers,—and is of grave and serious concern to common carriers and shippers alike. The case presents propositions of law which appear in conflict with the laws of the

Congress of the United States, the rulings of the Interstate Commerce Commission, and the decisions of this Honorable Court; and leaves the door open for illegal discrimination by common carriers in favor of preferred shippers; favors shippers originating interstate commerce in one state as against those originating like commerce in other states, and threatens the success of the primary purpose for which the laws of Congress regulating commerce among states by common carriers was enacted,—that of preventing undue discrimination giving rebates, and of affording equal and uniform treatment to shippers and defining and creating the legal rights and duties of shippers and carriers.

VII.

The legal questions involved are as follows:

(1) The shipper having declared the value of the animals at the time of tendering them for shipment, for the purpose of obtaining the lowest rate for the shipment, between interstate points, and having secured a rate based upon such value, ascertained in the manner required by the rules, regulations and tariffs filed with the Interstate Commerce Commission, and published as required by law, without collusion or fraud on the part of the carrier, would it not be illegal under the federal commerce act for the carrier to pay a greater sum to the shipper than such declared value?

(2) Did Congress by section 6 and section 20 of the interstate commerce act legislate in respect to interstate rates, discrimination, the giving of rebates and the adoption of devices therefor; also in respect to bills of lading and receipts relating to interstate shipments, so that substantive legal rights (as distinguished from

remedies or methods of enforcing the same) are created thereby to the exclusion of causes of action or substantive legal rights existing at common law, or by the written law of the several states?

(3) Is not a shipper declaring a valuation, which is stated in a contract or bill of lading for the purpose of securing (and which is thereby secured) without collusion or fraud on the part of the carrier, a rate for transportation of an interstate shipment, legally estopped from claiming or recovering a sum of money in excess of such declared valuation in a suit for damages for loss of such shipment?

VIII.

Your petitioner urges that said judgment of said Circuit Court of Appeals is erroneous, for that,

(a) Said judgment and opinion in support of the same are in opposition to, and in conflict with, the laws of the United States as enacted by the Congress thereof, and as declared by this honorable court, and many of the courts of the several states in that: Section 6 of an act entitled "An Act to Regulate Commerce," approved February 4, 1887 (24 Statutes at Large, 379), as amended by the act of June 29, 1906, known as the Hepburn Act (34 Statutes at Large, 584), in force at the date of said shipment, commands equal and uniform service and treatment to shippers. By said act penalties are imposed for the acceptance of any

> "greater, or less, or different compensation * * * or for any service in connection therewith"

than the rates and charges

> "specified in the tariff filed and in effect at the time."

To that end it is also made unlawful for a carrier by any device to

> "extend to any shipper any privileges or facilities * * * except such as are specified in the tariff;"

which rates, fares and charges, rules and regulations, when filed and published, become a legal rule of action controlling the carrier in respect thereto; and may not be departed from, nor may any greater or less or different compensation, rule or regulation, be prescribed or enforced except and until authorized by the Interstate Commerce Commission,—that permitting the respondent to recover more than the value declared for purpose of securing the rate fixed,—is a forbidden departure from the law recognized by the Interstate Commerce Commission, as appears *In the Matter of Released Rates*, 13 Int. St. Com. Rep., 550.

(b) Said judgment and opinion is erroneous for; that the record shows the terms of the live-stock contract as to rates were embodied in the tariffs filed with the Interstate Commerce Commission and legally published; that they thereby became a part of such tariffs as well as of the law; that they remain a part of the tariffs and the law until set aside by the Interstate Commerce Commission; that they are, consequently, binding upon both shipper and carrier and entitled to the same force and effect as if embodied in the interstate commerce act itself; that a departure therefrom, either by shipping upon different terms, or recognizing a different measure of liability in the event of loss or injury to the property, than is prescribed by said contract, constitutes *a discrimination prohibited by the terms of the act;* that respondent having violated the law in understanding the

valuation of said animals, he should not be allowed to urge a claim founded upon his own iniquity.

> "When regularly published it (the rate) is no longer the rate imposed by the carrier, but the rate imposed by the law. The law governing transportation between the two points for which that rate was established requires that rate to be paid by the shipper and collected by the carrier, and any departure from it, either by the carrier or the shipper, is as much a crime as it would be if the rate had been fixed by specific enactment. Not even a court may interfere with a published rate or authorize a departure from it when it has been established voluntarily by the carrier."

Poor Grain Co. v. C. B. & Q. R. R. Co., 12 Int. St. Com. Rep., 418, 422.

(c) Said judgment and opinion is also erroneous for; that the rights and duties of shipper and common carrier, since the passage of the Hepburn Act, in respect to the rates and charges for interstate transportation, are not determined by private contract between parties, but are controlled by the tariffs filed with the Interstate Commerce Commission and published as required by law.

(d) That said judgment and opinion is erroneous for; that by paragraphs 11 and 12 of Section 20 of the Interstate commerce act, as amended by the act of June 29, 1906 (34 Stat. L., 595), known as the Carmack amendment, a bill of lading is required to be issued for each interstate shipment by the initial carrier; that said written contract, exhibit 1, was a bill of lading and valid both as showing the contractual relations between the parties in so far as they were not limited by the terms of the Federal act; and also as containing evidence of the declaration of value made by the shipper; that exhibit 1 was properly admissible as containing evidence of such declar-

ation, whatever may have been the legal status of the "limitation of liability" clause contained therein; that such declaration constituted such misconduct as to work an estoppel *in pais* against the recovery of an amount in excess of such declared value when the animals were lost.

(e) That said judgment and opinion ignore the fact that the rate charged for such transportation is fixed in such tariff under legal authority on a graduated valuation declared by the shipper; that the respondent herein declared a valuation for the purpose of securing and did secure the rate charged and received without collusion or fraud on the part of the railway company; that the shipment at the time of its loss was moving in accordance therewith; that these conditions appearing, the law fixed the status of the parties and of the shipment and that it would have been a violation of law to depart therefrom.

That said interstate commerce act, as so amended, applies to the entire territory comprised in the United States, and governs all common carriers by rail operating therein; that the same substantive legal rights abide with a shipper in Illinois who ships to Nebraska, as with a shipper of Nebraska who ships to Illinois; that to dissect the territory of the United States into fragments coincident with state lines and to apply said law of Congress only to a state as it may refrain from passing, or refuse to, pass laws inconsistent with said law of Congress or opposed thereto, renders the entire purpose and scope of the Federal law in the respects covered by sections six and twenty of said interstate commerce act, unavailing and nugatory, in respect to discrimination forbidden by said act, in each state that shall see fit to adopt such inconsistent, opposing or contrary laws, and the tendency and effect of the decision and judgment of said Circuit Court of Appeals is to uphold such laws of

the several states when enacted, and to prevent the enforcement of, and to destroy, said laws of the United States regulating and controlling interstate commerce, when the latter shall be opposed to, or in conflict with, such laws of the several states.

(f) That said judgment is also erroneous in that it sets at naught and refuses to give the petitioner the benefit of the facts pleaded by it as an estoppel, and which facts were established by evidence upon the trial of said cause. The rate charged and received for the transportation of the animals rested upon the valuation and was so known to be based by the respondent; and a false declaration of value, either in writing or orally expressed, was a misrepresentation of their true value in order to gain an interstate rate of charge to which respondent was not entitled, and was an attempt to deprive your petitioner of the right to be compensated in proportion to the value of the animals and consequent risk assumed, and thereby tended to lessen the vigilance which your petitioner should have otherwise observed; and also exposed your petitioner to a greater risk than it intended or was bound to assume for the rate actually charged and received. The advantage thus gained by respondent and the loss suffered by petitioner are repugnant to principles of fair dealing and the freedom of contract and therefore in conflict with sound public policy.

Hart v. Penn. R. R. Co., 112 U. S., 331.

In re Released Rates, 13 Int. St. Com. Rep., 550.

That the valuation and freight rate did not become fixed until the former was stated by the shipper. The rate was graduated according to valuation. If each animal had been declared to be worth more than $100, the rate would have been fixed according to the tariff at an

increased stated per cent for each 100 per cent or fraction thereof of additional value. The respondent made his choice of rates, measured by the valuation expressed, within those fixed by law. He ought not to be permitted to recover a greater sum, as the value of the animals, when lost or destroyed, than the value declared for the purpose of securing the lower rate.

Your petitioner further represents, that it has filed in the clerk's office of this Honorable Court a certified copy of the transcript of the record, including all proceedings, in the United States Circuit Court of Appeals, Eighth Circuit.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said court to certify and send to this court on a day certain, to be therein designated, a full and complete transcript of the record of proceedings of the said United States Circuit Court of Appeals for the Eighth Circuit in the cause of the Chicago, St. Paul, Minneapolis and Omaha Railway Company, plaintiff in error, against Bud R. Latta, defendant in error, No. 3444, to the end that said case may be reviewed and determined by this court as provided in the act of Congress entitled "An Act to establish Circuit Courts of Appeals, and to define and regulate in certain cases, the jurisdiction of the courts of the United States and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this Honorable Court may seem appropriate and in conformity with said act, and that the judgment of said United States Circuit Court of Appeals for the Eighth

Circuit in said case, and every part thereof, may be reversed by this Honorable Court.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, *Petitioner.*

By .....

.....

.....

State of Nebraska, }
County of Douglas, } ss.

....., being duly sworn, says that he is one of the counsel for the petitioner above; that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

.....

Subscribed in my presence and sworn to before me by ..... this .. day of February, 1911.

.....
Notary Public,
Douglas County, Nebraska.

My commission expires ....., 19..

I hereby certify that I have examined the foregoing petition and in my opinion the petition is well founded and that the case is one in which the prayer of the petitioner should be granted by this court.

.....
Counsel for Petitioner.